

... competition in Guam should result not only in increased choices, higher quality service, and lower rates, but will also provide an incentive to the incumbent rural telephone company to introduce new and innovative services, including advanced service offerings, to remain competitive, resulting in improved service to Guam consumers.²¹

Proceeding to the next step in its analysis, the WCB then concluded that consumers would not be harmed, by Guamcell's designation, emphasizing that the applicant's use of its own facilities would enable it to serve customers otherwise left without service in case an ILEC relinquished its ETC status.²²

In the instant proceeding, the WCB followed *Western Wireless, Pine Ridge*, and *Guamcell* in concluding that:

[c]ompetition will allow customers in rural Alabama to choose service based on pricing, service quality, customer service, and service availability. In addition, we find that the provision of competitive service will facilitate universal service to the benefit of consumers in Alabama by creating incentives to ensure that quality services are available at "just, reasonable, and affordable rates."²³

Consistent with its prior decisions, the WCB concluded that:

there is no reason to believe that consumers in the affected rural areas will not continue to be adequately served should the incumbent carrier seek to relinquish its ETC designation ... the parties opposing this designation have not presented persuasive evidence to support their contention that designation of an additional ETC in the rural areas at issue will reduce investment in infrastructure, raise rates, reduce service quality to consumers in rural areas or result in loss of network efficiency.²⁴

²¹ *Guamcell, supra*, at ¶ 15.

²² *See id.* at ¶ 17.

MO&O at ¶ 25.

²³ *Id.* at ¶¶ 27-28.

The ARLECs **incorrectly** assert that the *MO&O* is called into question by its reliance on *Pine Ridge*.²⁵ The WCB's public interest analysis was consistent not just with *Pine Ridge*, but with other decisions as well.²⁶ The ARLECs fail to address the other decisions, discussed above, which support the conclusions reached in the *MO&O*. Second, *Pine Ridge* is not "materially different" from this case. In both cases, the WCB concluded that the applicant had successfully made the "threshold demonstration" that its service offering "fulfils several of the underlying federal policies favoring competition and the provision of affordable telecommunications service to consumers."²⁷ The only difference in the analysis in *Pine Ridge* was that, having determined that the applicant's designation for the Pine Ridge reservation was in the public interest, the WCB added that a grant of the requested ETC status "will also serve the public interest by removing impediments to increasing subscribership on the Reservation."²⁸ The WCB's discussion of *additional* reasons supporting a public interest finding does not diminish or qualify its conclusions.

Accordingly, it is clear that the WCB properly applied its own precedent in its analysis of the public interest benefits of designating Cellular South as an ETC throughout its service area in Alabama.

C. The ARLECs Failed to Show that Consumers Would be Harmed

The WCB has concluded that designation of qualified wireless carriers as ETCs in rural areas **is in the public interest, absent specific demonstrations that consumers will be harmed as a**

²⁵ See Application at p. 21.

²⁶ If an order is consistent with Commission precedent, it is unnecessary for all supporting authority to be actually cited in the order. Section 1.115 of the Commission's rules does *not* list failure to cite all relevant precedent among the grounds for overturning an action taken pursuant to delegated authority.

²⁷ *MO&O* at ¶ 22; *Pine Ridge*, *supra*, 16 FCC Red at 18137.

²⁸ *Id.* at 18137-38.

result.”²⁹ Addressing the ARLECs’ arguments raised in comments and *iii* several *ex parte* filings, the WCB properly concluded that Cellular South’s designation throughout its Alabama service area would not harm rural consumers.

The ARLECs complain about broad policy questions concerning how ETCs are to receive high-cost support, yet they have never made any specific showing in this case that Cellular South’s designation might result in reduced infrastructure investment, increased rates, diminished service quality, or lost network efficiency. In filing comments in opposition to Cellular South’s Petition and in multiple *ex parte* presentations, the ARLECs “merely presented data regarding the number of loops per study area, the households per square mile in their wire centers, and the high-cost nature of low-density rural areas.”³⁰ In response, Cellular South demonstrated that the ARLECs inappropriately used Benchmark Cost Proxy Model 3.0, which produces inaccurate results and overstates the necessary investment in network facilities, especially in areas of low line density. In addition, the ARLECs improperly relied on household density, averaged at the census block level, as a predictor of network costs in rural areas.

Even accepting the ARLECs’ position that sparsely populated areas are expensive to serve, those areas are precisely where the FCC has attempted to stimulate competition and deployment of more efficient technologies, and where competitive carriers cannot reach many customers without high-cost support. By emphasizing their own difficulties when faced with the prospect of competition, the ARLECs completely ignore the fact that “the purpose of universal service is to benefit the customer, not the carrier.”³¹

²⁹ See, e.g., *Western Wireless*, *supra*, 16 FCC Red at 56-57; *Western Wireless Recon. Order*, *supra*, at ¶ 19; *Pine Ridge*, *supra*, 16 FCC Red at 18138-39.

MO&O at ¶ 28.

³¹ *Alenco Communications Inc. et al. v. FCC*, 201 F.3d 608, 621 (5th Cir. 2000).

In sum, the WCB properly rejected the ARLECs' speculative arguments that rural consumers would be harmed by Cellular South's designation.

II. ONGOING REVIEW OF USE ISSUES DOES NOT JUSTIFY SUSPENSION OF EXISTING RULES

The ARLECs claim it is "premature" for the WCB to designate any additional ETCs in rural areas until the Commission has resolved those matters raised in its November 8, 2002, *Referral Order*.¹² In effect, the ARLECs absurdly ask the Commission to freeze the processing of pending applications, validly filed under existing rules, while the Joint Board considers a possible recommendation to the FCC.

It scarcely bears mention that the law by its very nature is constantly evolving, and that no rule is immune from review. Congress and governmental agencies such as the FCC are tasked with changing and improving the law on an ongoing basis. For example, the Commission's biennial review process involves ongoing review and modification of existing rules.¹³ Just last year, the Commission phased out its spectrum cap.¹⁴ The rules for CLEA, E-911, number portability and pooling are all in a state of flux. Here, competitive ETCs such as Cellular South will be required to deal with whatever the FCC eventually does. The ARLECs' suggestion that all competitive ETC applications for rural areas be suspended pending the consideration as to whether to change rules may properly be described as anti-competitive. No law or rule can be assumed to "continue unchanged."¹⁵ If the ARLECs believe the regulatory world will have no

Application at p. 11.

¹² See 47 U.S.C. § 161.

¹³ See *2000 Biennial Regulatory Review, Spectrum Aggregation Limits For Commercial Mobile Radio Services, Report and Order*, WT Docket No. 01-14, Report and Order, FCC 01-328 (rel. Dec. 18, 2001).

¹⁴ See Application at p. 13.

certainty or purpose until the Commission adopts rules [that are permanent and non-reviewable, they will wait in vain.

Predictably, the ARLECs also suggest that, even though the ongoing review will likely affect both incumbent LECs and competitive ETCs, only their competitors should be blocked from receiving high-cost support. Cellular South asks the Commission to see the ARLECs' request for what it is: a request to suspend action on "unresolved Commission policy" so as to prevent the ARLECs from facing viable competition for the first time.

The ARLECs also suggest that changes to the Commission's existing policies that reduce support to CETCs may color a CETC's willingness to construct facilities to serve all customers in its service area.³⁰ While Cellular South appreciates the ARLECs' concern, CETCs will and must adapt to any changes that may result from the Joint Board's ongoing review. Although Congress substantially deregulated mobile wireless services in its 1993 amendments to Section 332 of the Act,³¹ new government mandates, such as enhanced wireless 911, CALEA, and number pooling, as well as state efforts to re-regulate, all force carriers such as Cellular South to adjust.

Many competitive ETCs have already been designated in rural areas and are already receiving support. Any policy changes proposed by the Joint Board will take existing CETCs into account. Like all other CETCs, Cellular South will be subject to such policy changes.

³⁰ *See id.* at p. 12.

³¹ *See The Omnibus Budget Reconciliation Act of 1993*, § 6002(b), Pub. L. No. 103-66, Title VI, § 6002(b), amending the Communications Act of 1934 and codified at 47 U.S.C. §§ 153(n), 332.

III. THE WCB PROPERLY DECLINED TO CONSIDER THE COLLATERAL ISSUES RAISED BY THE ARLECS

In their comments and *ex parte* filings, the ARLECs and other commenters representing ILEC interests inappropriately raised a number of additional issues, all of which are either broad policy issues or have been adjudicated by a final order in multiple proceedings. The WCB properly declined to consider these issues, concluding that such concerns are “beyond the scope of this Order, which considers whether to designate a particular carrier as an ETC.”³⁸

Nonetheless, Cellular South is constrained to briefly address the ARLECs’ discussion of “explosive” fund growth. The ARLECs, as well as a number of ILEC presentations before this Commission, have completely distorted this debate. The ARLECs’ stated concern that designation of additional wireless ETCs will cause the federal universal service fund “to grow to unmanageable proportions”³⁹ ignores the manner in which support to competitive and incumbent ETCs impacts the fund respectively. As the ARLECs concede, support to competitive ETCs amounts to less than 2% of total high-cost support.⁴⁰ From the standpoint of a monopolist, the increase from 0.4% is steep – indeed, the figure was zero until only recently.

Conveniently, the ARLECs fail to mention that it is the ILECs who have been the greatest beneficiaries of the Commission’s recent changes to its universal service rules relating to rural areas. Time and again, ILECs have successfully convinced the Commission and Congress to ensure the maximum level of high-cost support to ILECs while seeking to prevent competitors from accessing high-cost support, despite the fact that those competitors pay into the fund. While professing concern about growth in the fund, at least five ARLEC member companies were

³⁸ MO&O at ¶ 32.

³⁹ Application at p. 14.

⁴⁰ See *id.*

among those ILECs who sued in federal court to remove the cap on the high-cost fund and the cap on the amount of corporate operations expenses that may be reported.⁴¹ When the Commission increased rural ILEC support by over \$1.26 billion in the *Fourteenth Report and Order*,⁴² rural telephone companies showed remarkably little concern for the sustainability of the fund

It is disingenuous for the ARLECs to suggest that the Commission's decision to apply unspent funds from the Schools and Libraries Division ("SLD") to the High Cost program has anything to do with high-cost support to competitive ETCs.⁴³ During the *three quarters in question*, over \$850 million in unspent funds from the SLD was applied to the High Cost program to stabilize the contribution factor.⁴⁴ Based upon a review of available Universal Service Administrative Company ("USAC") data, it appears that the amount of high-cost support received by competitive ETCs during the same period amounted to less than \$50 million. The rest went to ILECs.

Finally, Cellular South notes that the Commission is addressing the increasing demands on the fund in other proceedings of broader applicability, including taking steps to reform the universal service contribution methodology.⁴⁵ The reallocation discussed above was taken as an

⁴¹ See *Alenco*, 201 F.3d at 620-21.

⁴² See *Federal-State Joint Board on Universal Service, Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, Fourteenth Report and Order, Twenty-second Order on Reconsideration, and Further Notice of Proposed Rulemaking*, 16 FCC Rcd 11244, 11258 (2001) ("*Fourteenth Report and Order*").

⁴³ See Application at pp. 13-14.

⁴⁴ See Public Notices announcing no change in USF contribution factor, DA Nos. 02-1409, 02-2221, and 02-3387 (WCB rel. June 13, 2002, Sept. 10, 2002, and Dec. 9, 2002, respectively).

⁴⁵ See *Report and Order and Second Further Notice of Proposed Rulemaking* in CC Docket Nos. 96-45, 98-171, 99-571, 99-237, 99-200, 98-116, and 98-170 and NSD File No. 1-00-72 (rel. Dec. 13, 2002).

interim measure pending the reform of the universal service contribution methodology,⁴⁶ not pending an ILEC-sponsored rollback of competitive ETC policy.

While ensuring the future viability of the fund is an important concern, it is no less important that the Commission carry out its statutory responsibility of administering a competitively neutral universal service program that provides rural consumers with comparable choices in telecommunications service to those available in urban areas and places competitors on a level playing field with incumbents.⁴⁷ Accordingly, the ARLECs' purported concerns about the size of the fund were properly excluded from the scope of the WCB's determination, and there is no need to entertain them on review.

I). CONCLUSION

The ARLECs can provide no valid reason to disturb the WCB's grant of ETC status to Cellular South throughout its Alabama service area. By designating a qualified wireless carrier as an ETC, the WCB has ended the ARLECs' monopoly on universal service support, paving the way for Alabama's rural consumers to begin to experience the benefits of facilities-based competition.

Congressional and FCC policy holds that designation of competitive ETCs in all areas is in the public interest, unless specific harm to consumers will result. As shown above, the ARLECs have utterly failed to demonstrate that consumers will be harmed by Cellular South's designation, only providing flawed evidence that improperly focuses on how ILECs might be affected. Also, the ARLECs' proposal to freeze competitive entry by Cellular South and other

⁴⁶ See Public Notice, *Proposed First Quarter 2003 Universal Service Contribution Factor*, DA 02-3387 at p. 2 (WCB rel. Dec. 9, 2002).

⁴⁷ See 47 U.S.C. § 254(b)(3). See also *Federal-State Joint Board on Universal Service*, CC Docket No. 96-15, *Recommended Decision*, FCC 021-2 (Jt. Bd. rel. Oct. 16, 2002), Statement of Commissioner Kevin J. Martin Approving in Part, Dissenting in Part ("I fail to see how the potential for greater funding levels should prevent us from adopting a support system that meets our statutory obligation").


competitive ETC's pending a review of its rules --- which ultimately may not change the process for designating competitive ETCs and may equally affect incumbents --- is anticompetitive and fundamentally misconceives the agency rulemaking process. The remaining issues raised by the ARLECs and other ILEC commenters were properly found to be outside the scope of this proceeding.

In sum, a reversal of the WCB's grant would not reflect sound public policy, but would favor one class of competitor, and one type of technology. Rural consumers would be deprived of competitive choice, contrary to the purposes of the 1996 Act. For the reasons stated above, Cellular South urges the Commission to deny the ARLECs' Application

Respectfully submitted,

CELLULAR SOUTH LICENSES, INC.

By:


David A. LaFuria
Steven M. Chernoff
Its Attorneys

Lukas, Nace, Gutierrez & Sachs, Chtd
1111 19th Street, N.W., Suite 1200
Washington, DC 20036
(202) 857-3500

January 14, 2003

CERTIFICATE OF SERVICE

I, Janelle T. Wood, a secretary in the law office of Lukas, Nacc, Gutierrez & Sachs, hereby certify that I have, on this 14th day of January, 2003, placed in the United States mail, first-class postage pre-paid, a copy of the foregoing *Opposition to Application For Review* filed today to the following:

William Maher, Esq.*
Chief
Wireline Competition Bureau
Federal Communications Commission
445 12th St., S.W.
Room 5C-450
Washington, DC 20554

Jessica Rosenworcel, Esq.*
Legal Advisor to the Chief of the
Wireline Competition Bureau
Federal Communications Commission
445 12th St., S.W.
Room 5C-433
Washington, DC 20554

Katherine Schroder, Esq.*
Chief, Telecommunications Access Policy
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 5A-423
Washington, DC 20554

William Scher, Esq.*
Assistant Chief
Telecommunications Access Policy Div.
Wireline Competition Bureau
Federal Communications Commission
445 12th St., S.W.
Room 5B-550
Washington, DC 20554

Mark Seifert, Esq.*
Deputy Chief
Telecommunications Access Policy Div.
Wireline Competition Bureau
Federal Communications Commission
445 12th St., S.W.
Room 5A-423
Washington, DC 20554

Anita Cheng, Esq.*
Acting Deputy Chief
Telecommunications Access Policy Div.
Wireline Competition Bureau
Federal Communications Commission
445 12th St., S.W.
Room 5A-445
Washington, DC 20554

Cara Voth, Esq.*
Telecommunications Access Policy Div.
Wireline Competition Bureau
Federal Communications Commission
445 12th St., S.W.
Room 5A-640
Washington, DC 20554

Richard Smith, Esq.*
Telecommunications Access Policy Div.
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 5A-660
Washington, DC 20554

Walter L. Thomas, Jr., Secretary
Alabama Public Service Commission
KSA Building
100 North Union Street
Suite 850
Montgomery, AL 36101

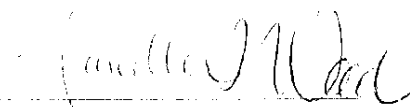
Alabama Rural Local Exchange Carriers
c/o **Leah S. Stephens, Esq.**
Mark D. Wilkerson, Esq.
Brantley, Wilkerson & Bryan, PC
405 South Hull Street
Montgomery, Alabama 36104

William W. Jordan, Esq.
Vice President - Federal Regulatory
BellSouth Telecom Inc.
1133 31"
Suite 900
Washington, D.C. 20036

John M. Wilson, Esq.
Regional ~~Manager~~ Legislative Affairs
~~Verizon~~ Mid-States/Verizon South, Inc
100 N. Union Street
Suite 132
Montgomery, AL 36104

Pine Belt Telephone Company, Inc
c/o Kraskin, Lesse & Cosson, LLP
2120 L Street, N.W.
Suite 520
Washington, D.C. 20037

Carolyn C. Hill, Esq.
Vice President/Federal Regulatory Affairs
Alltel Corporation
601 Pennsylvania Avenue, N.W.
Suite 720
Washington, D.C. 10004


Yanelle T. Wood

* Indicates individuals who received a copy of the foregoing via Hand Delivery.